

4 Official Opinions of the Compliance Board 104 (2004)

COMPLIANCE BOARD – AUTHORITY AND PROCEDURES – OPINIONS – PUBLIC BODY’S SUMMARY OF DISCUSSION AT CLOSED SESSION PRESUMED TO BE ACCURATE, ABSENT EVIDENCE TO THE CONTRARY – QUASI-LEGISLATIVE FUNCTION – DISCUSSION LIMITED TO TOPIC WITH LIKELY FISCAL IMPLICATIONS, NOT INVOLVING BUDGET AMENDMENT ITSELF, HELD OUTSIDE THE FUNCTION – EXECUTIVE FUNCTION EXCLUSION – DISCUSSION OF EXISTING COLLECTIVE BARGAINING AGREEMENTS, HELD WITHIN THE EXCLUSION – EXCEPTIONS PERMITTING CLOSED SESSIONS – COLLECTIVE BARGAINING, §10-508(a)(9) – DISCUSSION OF EXISTING COLLECTIVE BARGAINING AGREEMENTS, HELD TO BE OUTSIDE THE EXCEPTION

December 3, 2004

*Jacquelyn Sams, President
League of Women Voters of Allegany County*

The Open Meetings Compliance Board has considered your complaint, filed on behalf of the League of Women Voters of Allegany County, alleging that the Allegany County Board of Education (“County Board”) violated the Open Meetings Act on June 8, 2004. Specifically, the complaint alleged that the County Board’s closed-session consideration of the reserves maintained in connection with an insurance fund and potential use of surplus reserved funds was improper.

We conclude as follows: The closing of the June 8 meeting was not justified based on an exception in the Act dealing with collective bargaining negotiations, which was the basis asserted by the County Board at the time. However, on the premise that discussion at the June 8 meeting was limited to how the surplus of reserves came to be and whether the surplus needed to be returned to employees, then the meeting qualified as an executive function to which the Open Meetings Act did not apply.

I

Complaint, Response, and Supplemental Record

The complaint alleged that on June 8, 2004, four of the five County Board members met in a session closed to the public to consider certain financial matters in connection with a self-insurance program operated by the school system.

According to the complaint, an individual was brought in to advise the County Board on the amount of reserves available in connection with the insurance fund and to discuss with the County Board how reserve funds might be used. In the League's view, this matter should have been discussed in an open session.

In a timely response on behalf of the County Board, G. Gary Hanna, Esquire, denied that the June 8 meeting was improperly closed. The meeting, according to the County Board's response and certain meeting notes and minutes included with the response, involved a report from Mr. Mike Marchini, with CBIZ Benefits and Insurance Services of Maryland, concerning reserve funds held in connection with a self-insurance plan covering health care benefits for employees and retirees of the school system.

The position of the County Board was that the closed session was justified under the Act's exception related to collective bargaining negotiations, §10-508(a)(9),¹ since health care coverage is addressed under four collective bargaining agreements negotiated by the County Board. The County Board included with its response a copy of the agreement with the Allegany County Teachers' Association, noting the obligation to provide health care coverage, and quoted the language addressing employee contributions in connection with dependent coverage:

The teachers' share of the premium for the cost of dependant coverage shall not exceed 25% of the prevailing dependant coverage rate for the point of service managed care. The cost to the teacher for dependant coverage under the comprehensive plan may exceed 25% of the prevailing dependant coverage rate, but not in excess of 50%. The teachers' share of the premium shall be paid by payroll deduction.

The County Board noted that the contract does not make clear how any shortfall or surplus in required reserves is to be addressed. Because part of the reserve is derived from employee contributions, the County Board needed to decide to what extent any surplus would be returned to employees, "a discussion [that] would directly impact the Board's position in its negotiated agreement." Since the collective bargaining agreement did not expressly address this matter, the County Board explained that "the discussion of the excess was related to the interpretation of the agreement and a possible modification of the agreement." In summary, the County Board concluded that "after noting that an excess may exist, the discussion was only about how the excess 'related' to the negotiated contract." The County Board noted that no final action was taken at that meeting. Final action in connection with this matter was taken during the course of a regularly scheduled public meeting, held September 14, 2004.

¹ Unless otherwise noted, all statutory references are to the Open Meetings Act, Title 10, Subtitle 5, of the State Government Article, Annotated Code of Maryland.

The County Board argued in the alternative that the June 8 discussions involved an executive function to which the Open Meetings Act did not apply. Because the County Board's response did not explain how this matter constituted an executive function, before our consideration of this matter, we asked the County Board to clarify its response.²

In its supplemental response, which also reiterated the position that the June 8 session was properly closed under §10-508(a)(9), the County Board contended that this session did not constitute an advisory, judicial, quasi-judicial, or legislative function, as those terms are defined under the Act.³ The supplemental response recognized that its discussion might be perceived as a "quasi-legislative function" in that it involved matters governed under a type of contract, namely, a collective bargaining agreement; however, the response noted that "there was never a discussion of amending the ... Agreement."

In essence, the supplemental response indicated that, on June 8, the County Board was simply carrying out current law through oversight of the school superintendent. As executive officer, secretary, and treasurer of the County Board, the superintendent is responsible for accounting for the funds in question and reporting to the County Board on the status of the funds. The superintendent used the services of Mr. Marchini to provide the financial information to the County Board. Pursuant to the existing collective bargaining agreement, the County Board was contractually obligated to pay health care benefits on behalf of employees. Thus, in the County Board's view, no new policy or new contract was developed in connection with the information offered by Mr. Marchini. Discussion was limited to whether excess reserve funds would need to be returned to employees pursuant to the current collective bargaining agreement. According to the County Board, when it appeared that discussion might extend beyond the obligation under the collective bargaining agreement to the actual use of the funds, the closed meeting was ended. Further discussion on this resource allocation question was conducted during a public session on September 14, 2004.

² Our request for a supplemental response resulted in the delay beyond the normal period in which we regularly issue an opinion.

³ If the session had involved any of these functions, then it could not have been an executive function. *See* Part II below.

II

Applicability of the Act

A. Introduction

Often the ultimate conclusion about the legality of a closed session depends on what was discussed. This is so not only because the exceptions in §10-508 are oriented to particular topics of discussion but also because the Act is simply inapplicable to certain topics. Of course, this fact results in a conundrum for the Compliance Board: We cannot firmly conclude whether a closed meeting violated the Act or not unless we know what was said during the meeting. Yet, our knowledge of what happened is dependent on the public body's after-the-fact, summary account. We can only presume that the public body's summary is accurate, absent evidence to the contrary, but we also recognize that such a summary might omit aspects of the discussion that, if they occurred, could shift our Open Meetings Act analysis.

This preface is intended to explain the approach that we shall adopt in analyzing the legality of the June 8 meeting. First, we shall proceed on the basis of the County Board's description of what was discussed and, as importantly, what was not discussed. That is, we shall take as given that the meeting consisted of a report about the nature of the insurance reserve surplus and a discussion of whether, under the collective bargaining agreements, the surplus needed to be returned to the employees. We shall also proceed from the premise that, although one or more County Board members might have raised the question of what should be done with the portion of the surplus not to be returned to the employees, discussion of this resource allocation question was cut off and deferred until the September 14 open meeting. Then, to offer fuller guidance, we shall assess the primary justification asserted for holding the closed meeting: that it was permitted by the "collective bargaining negotiations" exception in §10-508(a)(9). *See* Part III below.

B. Executive Function

Evaluating whether a particular discussion falls within the executive function exclusion under the Act involves a two-part analysis. First, did the discussion fall within any other defined function? If so, by definition it cannot be considered an executive function. §10-502(d)(2). If not, did discussions involve the administration of existing law? This second aspect of the analysis requires evaluation of whether the discussion involved the development of new policy or merely implementation of existing policy, because the executive function exclusion covers only the latter. *See 3 Official Opinions of the Maryland Open Meetings Compliance Board 39, 40*

(2000) (Opinion 00-10).⁴ See also Office of the Attorney General, *Open Meetings Act Manual* p. 13 (5th ed 2004).

Had the meeting dealt with the amendment of a collective bargaining agreement, it would have involved a quasi-legislative function under the Open Meetings Act. §10-502(j)(3). A session involving a quasi-legislative function may only be closed if authorized under §10-508(a). However, for the reasons explained under Part III A below, and acknowledged in the County Board's supplemental response, the June 8 session did not involve an amendment of existing collective bargaining agreements. The current collective bargaining agreements required that the County Board pay for certain benefits. Discussion during the closed session was limited to whether surplus funds, generated in part from employee contributions, must be returned to employees under the agreements.

More problematic, in our view, is whether the County Board's session might be characterized as a preliminary discussion in connection with a possible budget amendment, an action that also would be a quasi-legislative function under the Act. §10-502(j)(2). Based on the County Board's account of what was discussed, however, we view the June 8 meeting as separate from, not a part of, the subsequent budget amendment process.

A budget amendment, by its very nature, is a reaction to changed circumstances. Costs or revenues differ from the assumptions underlying the original budget, and so it must be amended. The budget amendment process, which the Act declares to be quasi-legislative, covers all of the deliberations about how the budget should be adapted to the changed circumstances. It does not follow, however, that a meeting in which the changed circumstances are first revealed is necessarily itself part of the budget amendment process. A school board might well seek to understand the new situation at one meeting and only later take up the budget reallocation that follows from it.

As we see it, the June 8 discussion about the self-insurance surplus was of this limited nature. The County Board was hearing that a surplus existed and would not have to be returned in full to the employees. This was news, to be sure, that would have important budgetary implications, but the June 8 discussion did not yet involve the budget amendment process.⁵ The County Board indicated that when the discussion was about to go beyond current obligations under the collective bargaining agreements to the broader issue about appropriate use of funds, the

⁴ For brevity's sake, we shall hereafter cite our opinion volumes as *OMCB Opinions*.

⁵ Presumably, to the extent that some of the excess contributions needed to be returned to employees, this could be accomplished by suspending withholdings; no budget amendment would be needed.

discussion ended. The resource allocation discussion – given that we can use some of this money, what should we do with it? – awaited the September 14 open session.

In short, if (as we are given to understand) the June 8 discussion did not go beyond the question whether the surplus funds would have to be returned to employees, then the County Board was engaged in an executive function – that is, the administration of the existing collective bargaining agreements. Consequently, the Open Meetings Act did not apply to the June 8 meeting.

III

Exceptions Under the Act

A. Collective Bargaining Issues - §10-508(a)(9)

Although the June 8 meeting was an executive function and could lawfully be closed for that reason, to provide further guidance we shall nevertheless address the County Board's primary position: that its June 8 meeting was properly closed under §10-508(a)(9).

The Open Meetings Act allows a public body like the County Board to close a meeting to "conduct collective bargaining negotiations" or to "consider matters that relate to [collective bargaining] negotiations." §10-508(a)(9). However, as with any exception under §10-508(a), the exception for collective bargaining matters must be strictly construed in favor of open meetings. §10-508(c). Thus, to come under this exception, the discussions must have a "direct and material bearing on the conduct of negotiations." 3 *OMCB Opinions* 245, 249 (2002) (Opinion 02-15).

As we understand the facts, the collective bargaining agreements at issue simply cap the maximum contribution that employees may be asked to make towards the costs of health care benefits for dependents. There is no suggestion that the collective bargaining agreements would need to be modified in light of the adjustment in the amount of reserves considered during the course of the June 8 meeting. The issue was excess revenues contributed towards reserves. While any decision might affect employees' future contribution rates, there is no evidence that the Board would need to renegotiate any provision of the existing collective bargaining agreements as a result of a decision. In fact, in its supplemental response, the County Board acknowledged that there was never any discussion of amending a collective bargaining agreement. Not every discussion of how to apply an *existing* collective bargaining agreement to a set of facts is covered by the exception in §10-508(a)(9) .

To be sure, the decision concerning use of reserve funds might be a matter that could arise in *future* collective bargaining negotiations. However, that possibility is too remote to justify closure under §10-508(a)(9). Thus, we find that the County Board was incorrect in relying on §10-508(a)(9) as the basis for the closing of its June 8 meeting.

B. Consultation with Counsel - §10-508(a)(7)

In its supplemental response, the County Board noted that the question whether excess money in its insurance reserve could legally be added to the general reserve fund was directed to its legal counsel. Thus, the County Board argued, a closed session would have been authorized under §10-508(a)(7), which allows for a closed meeting to “consult with counsel to obtain legal advice.” Indeed, if the closed session had been limited to obtaining counsel’s advice based on the facts presented by the consultant, the County Board would have been justified in closing the meeting under §10-508(a)(7). However, there is no evidence that the County Board relied on this justification for closing the June 8 meeting, and the County Board may not assert an exception in §10-508 as a basis for closing a meeting that was not actually relied on in advance of the session. *See, e.g., 3 OMCB Opinions 307 (2003) (Opinion 03-11)*. If the Act applies, the public is entitled to know *at the time* what grounds the public body asserts to justify a closed session. §10-508(d).⁶

IV

Conclusion

Based on the County Board’s account of what was discussed at the June 8, 2004, closed meeting, we find that the discussion fell within the executive function. Consequently, neither the substantive nor procedural requirements of the Act applied, and no violation occurred. However, we point out that the County Board’s reliance on the exception related to collective bargaining negotiations, §10-508(a)(9), invoked at the time of the meeting, was misplaced.

OPEN MEETINGS COMPLIANCE BOARD

Walter Sondheim, Jr.
Courtney J. McKeldin
Tyler G. Webb

⁶ While an exception in the Act may not be asserted for the first time in response to a complaint, a claim of executive function may be asserted at any time, as the County Board has done here, because if the claim is correct, the Act never applied to the meeting in the first place.